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In the Supreme Court of the United States

OCTOBER TERM, 1980

TEAMSTERS LOCAL UNION NO. 115, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals acted reasonably in declining to remand the case to the Board for reconsideration of the need for imposition of a bargaining order.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Argument 5

Conclusion 7

TABLE OF AUTHORITIES

Cases:

NLRB v. *Gissel Packing Co.*, 395 U.S. 575 5

United Dairy Farmers Cooperative Ass'n, 242 N.L.R.B. 1026, remanded, 633 F. 2d 1054 ..... 3, 5-6

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

Section 8(a)(1), 29 U.S.C. 158(a)(1) 2

Section 8(a)(3), 29 U.S.C. 158(a)(3) 2

Section 9(a), 29 U.S.C. 159(a) 2, 3

Section 10(c), 29 U.S.C. 160(c) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-24) is reported at 641 F. 2d 984. The decision and order of the National Labor Relations Board (Pet. App. C-1 to C-61) is reported at 242 N.L.R.B. 1057.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1981. A petition for rehearing was denied on February 28, 1981 (Pet. App. A-1 to A-2). The petition for a writ of certiorari was filed on May 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), is set forth in pertinent part at page 2 of the petition. Also relevant is Section 9(a) of the Act, 29 U.S.C. 159(a), which provides in relevant part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

STATEMENT

1. The Board found that Haddon House Food Products, Inc. and Flavor Delight, Inc. (the "Company") violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by discharging eight employees on account of their activities on behalf of petitioner Union and by refusing to reinstate employees who went on strike to protest the Company's unfair labor practices following the employees' unconditional offer to return to work. The Board further found that the Company violated Section 8(a)(1) of the Act by threatening to discharge employees because of their union activities, by telling some employees that other employees had been discharged because of their union activities, and by promising benefits to employees to discourage such activities (Pet. App. C-1 to C-5, C-58 to C-59).

The administrative law judge (ALJ) had recommended a conventional cease and desist, reinstatement, and backpay order (Pet. App. C-59 to C-60). In addition, because the Company had committed "outrageous" and "pervasive" unfair labor practices that precluded the holding of a fair election, and notwithstanding the fact that the Union never had been designated by a majority of the employees as their

collective bargaining representative,[1] the ALJ recommended that the Company be required to bargain with the Union as the exclusive representative of all employees in the bargaining unit (Pet. App. C-57 to C-58, C-61).

The Board, with Chairman Fanning and Member Jenkins dissenting, declined to issue the recommended bargaining order.[2] Instead, in addition to the conventional remedies recommended by the ALJ, the Board imposed several extraordinary remedies "designed to dissipate as much as possible the lingering atmosphere of fear created by [the Company's] unlawful conduct and to ensure that if the question of union representation is placed before employees in the future they will be able to voice a free choice" (Pet. App. C-6). These additional remedies required the Company to: (a) mail notices signed by the Company's owner and manager setting forth the conduct from which

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[1]The ALJ found (Pet. App. C-52) that "at best" the Union had obtained valid authorization cards from "27 out of the 59 employees" in the bargaining unit.

[2]Members Murphy, Truesdale, and Penello, who comprised the Board majority, declined to issue a bargaining order for the reasons stated in their majority and concurring opinions in *United Dairy Farmers Cooperative Ass'n*, 242 N.L.R.B. 1026 (1979), remanded, 633 F. 2d 1054 (3d Cir. 1980) (Pet. App. C-6). In that case, Members Murphy and Truesdale acknowledged (242 N.L.R.B. at 1027; footnote omitted) that "the Board's remedial authority under Section 10(c) of the Act may well encompass the authority to issue a bargaining order in the absence of a prior showing of majority support" (242 N.L.R.B. at 1027). Nonetheless, in view of the "substantial risk of imposing a union on nonconsenting employees," they declined, in the exercise of their discretion, to issue such a bargaining order where, as in that case, other remedies could be devised that would "tend to restore an atmosphere in which employees are given a meaningful opportunity to exercise their Section 7 rights in an election" (*id.* at 1028). Member Penello was of the view that the Board lacked *authority* to issue a bargaining order in the absence of a showing of majority support for the Union, on the ground that such an order would be inconsistent with the principle of majority rule reflected in Section 9(a) of the Act, 29 U.S.C. 159(a) (242 N.L.R.B. at 1038-1043).

the Company will refrain in the future to all employees, including those presently employed and those who were on the Company's payroll at the time the unfair labor practices were committed; (b) publish copies of the notice in appropriate Company publications and in local newspapers of general circulation twice a week for four weeks; (c) have its owner and manager read the notice to the assembled employees in the presence of a Board agent; (d) upon request, grant the Union and its representatives reasonable access to Company bulletin boards and all places where notices to employees are customarily posted for two years; (e) upon request, grant the Union reasonable access to employees on Company premises in nonwork areas and on nonwork time for two years (or until a fair election has been certified); (f) upon request, provide the Union with the names and addresses of its current employees for one year; (g) afford the Union notice of, and equal time and facilities for it to respond to, Company speeches to its employees concerning union representation for two years (or until a fair election has been certified); and (h) permit the Union to deliver a 30-minute speech to employees on Company time prior to any Board election held within two years (*id.* at C-7 to C-8, C-11 to C-13).

2. On petitions for review by both the Company and the Union and a cross-application for enforcement by the Board, the court of appeals enforced the Board's order in all respects, except that it refused to require the Company owner and manager personally to read the notice described in item (c) above (Pet. App. B-13 to B-24).[3] The court rejected the Union's contention that, because Board Member Penello's decisive vote was based on his view that the Board lacked statutory authority to impose a bargaining order in

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[3]The court modified the order to require the Company to " 'have a responsible officer of [the Company] read' the Board notice" (Pet. App. B-24).

the absence of a showing of prior majority support for the Union (see note 2, *supra*), the court was required to decide whether, in fact, the Board possessed such authority since, if it did, a remand would be necessary to ascertain Member Penello's views concerning whether a bargaining order was appropriate in this case. Rather, the court held (Pet. App. B-11) that "the concerns that he has already expressed" concerning impairment of the principle of majority rule (see note 2, *supra*) indicate that Member Penello would join Members Murphy and Truesdale in concluding that, even if a bargaining order in favor of a minority union "may be justified in some hypothetical situation, * * * it is not appropriate in this case."

ARGUMENT

The question that the Union seeks to raise—whether the Board has statutory authority to issue a bargaining order to remedy an employer's "outrageous" and "pervasive" unfair labor practices that have prevented a union from attaining majority status—is not presented by this case.[4] As shown at pages 4-5 above, the court below found it unnecessary to decide that issue because, according to its reading of the Board's opinions, a majority of the Board had indicated that, even if it had such authority, the issuance of a bargaining order in this case would be inappropriate.[5] Accordingly,

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[4]In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Court held that a remedial bargaining order was justified where a union had at some point obtained authorization cards from a majority of the employees in the appropriate unit and the employer had committed unfair labor practices that tended "to undermine majority strength and impede the election processes" (*id.* at 614). The Court "left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices" (*id.* at 613).

[5]Because the court of appeals did not reach the issue, there is no conflict between the decision below and the Third Circuit's holding in *United Dairy Farmers Cooperative Ass'n* v. *NLRB*, 633 F. 2d 1054

the only question actually presented is whether the court below was correct in concluding that Member Penello, who believed that the Board lacked statutory authority to issue a bargaining order in favor of a minority union, would have declined to issue a bargaining order in this case if it were determined that the Board in fact had such authority. This issue, which turns on an interpretation of a particular Board decision, does not warrant review by this Court.[6] Moreover, since Member Penello voted to deny a bargaining order for the same basic reason that Members Murphy and Truesdale did—namely, to avoid trenching on the principle of majority rule (see note 2, *supra*)—the court of appeals did not act unreasonably in declining to decide the question whether the Board has authority to issue a bargaining order in favor of a minority union "merely in order to remand this case to the Board so that Member Penello can restate in slightly different terms the concerns that he has already expressed" (Pet. App. B-11).

(1980), that the Board has authority to issue a bargaining order to remedy "outrageous" and "pervasive" unfair labor practices that prevented a union from acquiring majority status.

[6]Indeed, as the Union notes (Pet. 9 n.2), the members who comprised the majority in this case are no longer on the Board.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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